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In The

Supreme Court Of The United States

EMR NETWORK,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

Amicus Curiae Brief Of the State Of Connecticut In Support Of Petitioner EMR Network's Petition for Writ Of Certiorari

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Questions Presented for Review by Petitioner

1. Does the Federal Communications Commission have an affirmative duty to develop evidence and to supplement the record in a proceeding before it to avoid "acting ignorantly when intelligent action is possible"----as expressed in the Second Circuit landmark decision in *Scenic Hudson.*

2. Does the Congressional mandate to the Federal Communications Commission to act "in a manner consistent with the public interest" in the deployment of broadband and other advanced wireless services require the FCC to determine the effect of its action on the environment and human health? (47 U.S.C. Sec 157)

3. Does the exclusive regulatory authority assigned to the Federal Communications Commission to set human exposure guidelines for RF Radiation--- pre-empting all State and Local Governments--- obligate the FCC to regularly review and update those guidelines? (47 U.S.C. Sec 332(c)(7)(B)(iv))

4. Does the National Environmental Policy Act (NEPA) impose a "continuing responsibility" on the FCC to use all practicable means to assure safe and healthful surroundings for all Americans when carrying out it statutory functions? (42 U.S.C. Sec. 4331 *et seq.*)

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OCTOBER TERM, 2004

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INTEREST OF THE AMICUS CURIAE

The State of Connecticut by Richard Blumenthal, its Attorney General, submits this brief pursuant to Supreme Court Rule 37.4 in support of petitioner EMR Network's petition for certiorari from the decision of the United States Court of Appeals for the District of Columbia denying EMR Network's petition for review of an order of the Federal Communications Commission (hereinafter "the Commission"). The State of Connecticut is presented with numerous applications for the siting of telecommunications towers and infrastructure. Among the numerous applications received by the state, the state has received applications for the siting of cell phone towers on a church property, on the front lawn of a house, and on a hospital property. There is a substantial reason to be concerned about the health effects of electromagnetic radiation and the emerging science must be examined in greater detail. Without greater understanding of the emerging science, the state is making siting decisions without the comfort of knowing that its citizens are safe.

The Telecommunications Act of 1996 prohibits the State from making its own informed decisions about the safety of communication towers. The state is prohibited by 47 U.S.C. Sec. 332(c)(7)(B)(iv) from denying an application if the communication facility complies with the Commission's regulations concerning the environmental effects of radio frequency emissions. In other words, the state may not deny an application based on emerging and credible science showing the harm of radiofrequency radiation, as it is otherwise permitted to do under its state

laws, if the Commission's outdated standards are met. Only the Commission may change its rules to permit a more protective standard; yet, the Commission has rejected a request to examine the science to ensure that its rules are protective. If a federal agency has the awesome power to preclude states from setting more protective environmental and health standards based on the most credible science available at the time an application is submitted to the state, the federal agency must use every available opportunity to ensure that its standards are based on the best and most current science possible.

SUMMARY OF ARGUMENT

The state of Connecticut is precluded from exercising its police power to protect the health and welfare of its citizens from the effects of radiofrequency radiation by 47 U.S.C. Sec 332(c)(7)(B)(iv), which gives the Commission exclusive power to regulate the environmental effects of radio frequency emissions. The FCC procedures allow it to conduct inquiries into matters over which it has jurisdiction. 47 CFR Sec. 1.430. When the pre-emptive authority to regulate with respect to the environmental effects of radio frequency emissions rests exclusively with the Commission, it is arbitrary and capricious for the Commission to reject petitions for inquiries into such matters because, according to the Commission, there are other agencies better suited to conduct such inquiries.

ARGUMENT

THE PRE-EMPTIVE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION OVER STATE GOVERNMENTS' ABILITY TO SET HUMAN EXPOSURE GUIDELINES OBLIGATES THE FCC TO REVIEW AND UPDATE THOSE GUIDELINES REGULARLY

The State of Connecticut is precluded from rejecting an application for a telecommunications tower that in its estimation will be harmful to the public health or environment if the applicant is in compliance with FCC standards. Absent the pre-emptive effect of 47 U.S.C. Sec. 332(c)(7)(B)(iv), Conn. Gen. Stat. Section 16-50p permits Connecticut's siting agency to consider the

> nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including, but not limited to, electromagnetic fields that, whether acting alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological balance, public health and safety....

The Telecommunications Act eliminates the state's ability to use its state powers to reject an application because it believes the radio frequency emissions to be harmful to its citizens as long as the applicant meets the radio frequency standards set by the Commission. 47 U.S.C. Sec. 332(c)(7)(B)(iv).

In denying EMR's petition for a Notice of Inquiry under FCC rules, 47 CFR Sec. 1.430, based on its determination that it is not the most appropriate forum to initiate such an inquiry, the Commission has abdicated its responsibilities. The FCC Order rejecting EMR's request finds:

> EMR had requested that we initiate a proceeding to gather information and opinion about the need to revise our current guidelines for evaluating human exposure to RF emissions from transmitters under the

> jurisdiction of the Commission. We find that OET was correct in dismissing the petition, having determined that *this Commission is not the most appropriate forum to initiate such an inquiry or proceeding concerning the environmental effects of RF radiation at this time.*

(Emphasis added.) (A-1—A-2).

The Commission's rejection of the request for inquiry based on a determination that it was not equipped to handle questions of environmental effects of radiation is an act in dereliction of its responsibilities, especially in light of its preemptive powers. The Commission is mandated to encourage the deployment of telecommunications technology "in a manner consistent with the public interest." 47 U.S.C. Sec. 157. It has already issued rules based on the thermal effects of radiofrequency radiation. Like it or not, the Commission cannot hold the power to preempt state regulation of environment effects of radiofrequency radiation, and then refuse to inform itself of the need to tighten controls because it is not the "right" agency to do so. The agency's determination on this point was arbitrary and capricious.

CONCLUSION

The Court should grant certiorari to review the arbitrary and capricious action of the Federal Communications Commission in refusing to grant the EMR's request for inquiry under the FCC rules on the biological health and environmental effects of radiofrequency radiation.

Respectfully submitted,

State of Connecticut

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